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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1523

DAVID B. SWOAP, as Director of the State Department of Benefit Payments,

Petitioner,

vs.

MARGUARITA GARCIA and PALMIDA CASTANON,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

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DAVID B. SWOAP, as Director of the State Department of Benefit Payments,

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MARGUARITA GARCIA and PALMIDA CASTANON,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

Petitioner, David B. Swoap, by his successor Marion J. Woods, Director of the California State Department of Benefit Payments, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Five, and the order of the California Supreme Court denying a petition for hearing.

OPINION BELOW

The opinion of the Court of Appeal, Second Appellate District, Division Five, is reported at 63 Cal.App.3d 903 (1976) [134 Cal. Rptr. 137] and also appears as Appendix A attached hereto.

JURISDICTION

The judgment of the Court of Appeal, Second Appellate District, Division Five, was entered on November 17, 1976. A

petition for rehearing was denied December 15, 1976 by that court. See Appendix B attached hereto. On February 3, 1977, the California Supreme Court denied the Director of the Department of Benefit Payments' petition for a hearing. See Appendix C attached hereto.

The instant petition seeks to invoke this Court's jurisdiction pursuant to the provisions of 28 U.S.C. 1275(3) in that the opinion below was based on an erroneous interpretation of federal welfare law that was precisely opposite from the interpretation thereof by the Department of Health, Education, and Welfare, the federal agency lawfully charged with sole administrative and quasi-legislative responsibility therefor.

QUESTIONS PRESENTED

1. Can a State court nullify formal federal (HEW) approval of State agency administration of a technical function requiring specialized expertise upon which State law is silent by failing to acknowledge or give any weight whatsoever to the federal agencies' interpretation of the Social Security Act for which it has sole administrative and quasi-legislative responsibility?

2. In performing the statutory federal mandate to consider outside income of recipients in the Aid to Families with Dependent Children program when computing grants, can a State welfare director be required by a State court to use a case budgeting method based on an estimate of income rather than a method approved by HEW using the most recent actual income data?

STATUTORY PROVISIONS INVOLVED

Federal

1. United States Code, title 42:

Section 602(a)(7) [§ 402(a)(7) of the Social Security Act]:

> "A State plan for aid and services to needy families with children must . . . (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid. . . ."

2. 45 Code of Federal Regulations, section 233.20(a)(3)(ii)(D):

> "net income available for current use and currently available resources shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance;"

State

1. California Eligibility and Assistance Standards Manual section 44-315:

".6 Budget Period

"The budget period for grant computation shall be the calendar month ending not more than 34 days before the first installment of the corresponding payment period. (See Section 44-305.22.)

"The grant for the initial and second calendar months shall be computed on the basis of known or estimated income in each of those two calendar months.

"The grants for the third and subsequent payment periods shall be based on actual income received in the budget period."

".8 Supplemental Payments

"If unusual and unforseen substantial changes in a recipient's income occur, a supplemental payment may be made when necessary to protect the welfare of the child(ren). Supplemental payments shall be limited in any month to the extent that the total grant, together with currently available income, does not exceed the allowable Maximum Aid.

"When a recipient receives a supplemental payment in more than one month, the total of such payments may not exceed the recipient's total net nonexempt income during the first and second months preceding a change in budgeting method used by the country; or during the first and second months for which aid payments are made."

STATEMENT OF THE CASE

1. Factual Background

This action concerns the manner in which welfare grants are computed in one of the major cash assistance programs, Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601-610.

Both federal and state law dictate that in computing periodic welfare grant payment amounts, net outside income and resources must be considered. In the case of income, consideration is synonymous with deduction from the statutorily established maximum permissible payment. This principle is not here in question, nor is there at issue any question of the nature of the income considered. There are innumerable rules and guidelines that revolve around exemptions, percentage disregards, and definitional exclusions that are applied to gross income. It is only after application of all of these rules and guidelines that net nonexempt income is considered, or deducted from the statutory maximum permissible payment. It is this resultant amount that is being referred to when the word income is used in connection with welfare case payment budgeting procedure.

Every state must necessarily employ some mechanism to measure recipient income against the grant level to determine the amount of the actual welfare check each recipient periodically receives. Nowhere is it dictated in federal law or regulation, or in state law, precisely how this concededly necessary function is to be performed. Federal law and regulations provide that recipients have a duty to report income, and welfare administrators have a duty to consider it.

In California there are about one and one-half million AFDC recipients who are in about 500,000 families. Case workers maintain case folders for each family, which is treated as an individual family budget unit. Prior to the 10th of each month, every family submits a form report to the welfare department. The report contains, among other things, information about the nonwelfare income, if any, for the family for the past month. The case worker then computes the actual amount of the welfare entitlement by deducting income as appropriate from the grant level for that family. The monthly entitlement thus computed is then disbursed in the form of two equal installment checks on the 1st and 15th of the following month.

A moment's reflection immediately focuses attention on the fact that it is impossible to know the amount of outside income for a given month and factor it into the welfare checks for the same month. When, for example, sometime in June, the computation is made to determine the grant for July, the actual amount of income to be received in July cannot be known unless one resorts to some form—no matter how sophisticated—of guesswork.

Prior to 1972, California used what may be called a "concurrent month" budgeting system. The case worker estimated what the income to the family would be in the month about to begin. The entitlement for the coming month, taking into account the estimate of future income, was then computed accordingly. Because this computation was based on an estimate, errors were frequent, resulting in numerous overpayments and underpayments. To deal with the large numbers of inaccuracies that predictably surfaced after the fact in a following month when the actual amount of income was established, a complicated system of recoupments, offsets, and applications for supplemental checks was utilized to correct the effects of the guesswork employed the month before. This was a constant, continuous, and burdensome appendage to an already complex welfare program.

Commencing in 1972, California began to use a modified system which came to be known as "prior month budgeting" (here-

inafter PMB). When the case worker received the report of income early in June, the *May* income documented therein was used to compute the *July* grant. This is the existing procedure that flows from the state regulations set forth above. *It should be noted that the PMB method HEW approved for use in California has no effect on the determination of need or initial eligibility. The system does not commence until the third month. For the first two months eligibility and grant amount are determined by the "concurrent" method.*

There are two significant differences between PMB and the concurrent method. First, the PMB system deals with known income received in the immediate past rather than estimated income to be received in the immediate future. The errors associated with the guesswork are thus eliminated. Secondly, there exists a short-term opportunity for windfall and/or misfortune when income changes. If income increases, the effect is not factored into welfare checks for two months. The recipient has the temporary benefit of both higher income and an unadjusted welfare check. If income decreases, the effect is potentially the opposite. The recipient would have reduced total income for two months before his welfare check increases were it not for a system of supplements. Many recipients subject to the potential of temporarily decreased total income are eligible for supplementary checks as provided for in the quoted regulation.

With regard to the second difference, however, it should be noted that the windfall or misfortune, if any, associated with PMB could and often did visit itself upon welfare families under the concurrent system formerly used due to mistakes in the monthly prognostications of future income. See concurring opinion, 63 Cal.App.3d at 915, Appendix A, p. 16.

2. How the Federal Question Is Presented

In late 1974, state director Swoap specifically requested that the Department of Health, Education, and Welfare review California's PMB procedure. On December 12, 1974, HEW replied that

the procedure was consistent with its regulation as a matter of law, and that as a matter of policy it was fully endorsed as a proper and efficient method of administration. The opinion of the HEW office of the general counsel and the transmittal of the program administrator were before all levels of the California court system. They are set forth herein as Appendix D for the convenience of this Court.[1]

Respondent Garcia filed suit in Los Angeles County Superior Court on behalf of herself and all whose grants were reduced based on income received in the immediate past. She sought to enjoin the use of prior month budgeting on the ground that it was an unlawful manner of administering the AFDC program. The trial court denied the relief requested and ruled in favor of petitioner herein.

The Court of Appeal, Second Appellate District, Division Five, reversed the trial court decision on the basis of "controlling federal law and policy governing the AFDC program . . . the mandatory requirements established by the Social Security Act, as interpreted and implemented by regulations promulgated by the Department of Health, Education, and Welfare." 63 Cal.App.3d at 909, Appendix A, page 8. Although the interpretation by HEW of its own regulation implementing the act it is charged to administer was before the court and was argued and discussed, no mention or acknowledgment thereof appears in the opinion.

A timely petition for rehearing was denied (Appendix B), and the California Supreme Court denied a hearing (Appendix C).

REASONS FOR GRANTING THE WRIT

I. Efforts to Reform and Streamline Welfare Administration Cannot Succeed If Federal Policy Options Are Eliminated by State Courts on a Selective and Inconsistent Basis

Computation of welfare grants, consideration of outside income and resources, and the constant need for the timely disbursement

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1. HEW refers to the regulation by its former number, 45 CFR section 233.20(a)(3)(ii)(*c*).

of millions of reasonably accurate assistance checks combine to create a technical and logistical problem of almost mind-boggling complexity. It is not surprising that HEW, the agency charged with meeting the most pressing of human needs with as much precision and compassion as government can muster, is the largest bureaucracy in the federal government. The same is true of equivalent agencies at the state level throughout the nation.

The need to reform the way welfare is administered in this country, and the public support of the present effort to do so, has become an almost daily topic of public conversation. The consensus around the need for speedy and comprehensive overhaul of the entire massive system of rules, regulations and guidelines and their sporadic and inconsistent application is too well recognized to require documentation. It is shared by virtually all connected with program administration at every level of government.

This case involving the matching of outside income against a statutory entitlement presents both an excellent example of the need for administrative streamlining, and at the same time a serious threat to the remedial action for which the current situation cries out.

The key to the legal treatment of outside income is obviously in the meaning of the words "available for current use" in the federal regulation 45 C.F.R. § 233.20(a)(3)(ii)(D) set forth above. It is self evident that the administrative logistics of grant computation forces one to face the fact that it is impossible to know the amount of outside income and factor it into the welfare checks all in the same month. One must either resort to estimated assumptions about future income or use the information on hand regarding income received in the immediate past.

There is a well founded proscription against inclusion in the eligibility and grant determination process of sources of income or support that are hypothetical or presumed as opposed to actual or tangible. See e.g. *King v. Smith,* 392 U.S. 309, 329-30 (1968); *Lewis v. Martin,* 397 U.S. 552, 558-60 (1970); *Van Lare v.*

Hurley, 421 U.S. 338, 345-46 (1975). That fact was acknowledged by the court below. 63 Cal.App.3d at 909-10, Appendix A, p. 9. However, that court also acknowledged that " . . . It is true that the federal regulation does not prohibit a welfare agency from considering income other than that which is in the recipient's pocket at the time of the current grant in computing the amount of the payment. . . ." 63 Cal.App.3d at 913, Appendix A, p. 13.

Having noted that grant computation requires a mechanism more sophisticated than counting cash on hand once a month and that availability of income cannot be taken too literally without producing an absurd and impossible result, the problem before the court became one of harmonizing the law with the realities of the technical logistical problems of welfare administration. This the court utterly failed to do. In marked contrast to the trial court whose proceedings it was reviewing, the appellate court attempted to solve the dilemma it dimly perceived (see concurring opinion, 63 Cal.App.3d at 915, Appendix A, pp. 15-16) by totally ignoring the expertise and opinions of the responsible executive agencies, state and federal, on an extremely technical and cumbersome, but critical, administrative function. It must be emphasized that we are not only addressing a failure to follow the federal agency opinion on a federal question on grounds of disagreement, but also a failure to even acknowledge its existence.

The opinion struck down the procedure now in use, which embodied HEW's and petitioner's opinion that the measuring period defining "available for current use" is not subject to a rigid specification, but does reasonably admit of a case budgeting methodology whereby income received in the last complete month can be counted against the payment level in the next complete month as long as no income is double counted or ignored, thus permitting the use of the latest available actual information

rather than estimates, presumptions or guesswork. See Appendix D. That view was not lightly or capriciously arrived at, but was a result of a careful weighing and balancing of many factors including those alluded to herein.

Having eliminated the preferred methodology without even acknowledging the considerations behind its approval and endorsement, the court left no usable guidance as to alternatives. It is impossible to speculate as to how the court would in further proceedings inform petitioners what its holding means without creating a conflict not only with decisions of this Court but with federal welfare law in the rest of the nation.

California's consternation with this state of affairs, however, is not the point here. The question that must be asked is how we are ever to approach a more sensible and uniform way of administering welfare. Let us assume a desire to make some form of prior month budgeting a nationwide practice in the interest of accuracy, consistency and lower administrative overhead, not at all a far-fetched proposition given HEW's present views. Shall the courts of every state feel free to ignore the opinion of the cognizant administrative agency and come to their own conclusions about the technical matter of welfare case budgeting practices? Is there any limit to the number of technical administrative issues that are subject to a similar fate? The welfare machinery is not running smoothly now. How much sand can we throw into it and still expect it to function as we contemplate reforms?

Unless certiorari is granted and the decision below is vacated, there can be no assurance that all hope of repairing and streamlining the welfare system will not be lost before the effort is seriously begun. It is impossible to even speculate as to how many federal options will be foreclosed in this way, perhaps in some states, perhaps not in others, and how many among a myriad of possible alternatives might be substituted therefor. Should this decision stand, it will be a constant warning to all concerned

with welfare administration and reform that any state court can at any time ignore the expertise of not only its own administrative agency, but that of HEW in the role of custodian of the Social Security Act as well; and on federal questions upon which state law is silent.

We are now faced with the fact that an important welfare administrative policy option favored by HEW is foreclosed in the nation's largest state. The situation elsewhere is now uncertain. The point being made here is not that the views of administrative agencies are sacrosanct, or that their actions ought not to receive appropriate judicial scrutiny. The point is that unless the judicial review function is performed properly according to rules long articulated by this and other courts, including California's, the entire nation's welfare programs will suffer crippling limitations upon efforts toward badly needed comprehensive restructuring.

II. The Department of Health, Education and Welfare's Responsibility to Interpret and Implement the Social Security Act Has Been Abrogated Regarding a Critical Aspect of Welfare Administration

It has long been well established that in reviewing the actions of the government, courts should not substitute their judgment for that of an administrative agency that acts in a quasi-legislative capacity regarding a technical and complex subject matter, absent a showing of arbitrary and capricious action. This Court has recognized the wisdom of this general rule many times and has applied it in specific instances regarding HEW's responsibility for welfare administration.

The portion of the Social Security Act dealing with welfare is written in broad and general terms. Although programs have proliferated and grown more complex over a period of some 40 years due to both legislative action and the increasing need to accommodate formal process into program functioning, through

all the years of change there has been one constant characteristic. The AFDC program has always been operated as a scheme of cooperative federalism, characterized by deference to HEW's interpretation of the Social Security Act, and broad latitude to states in allocating scarce resources among many competing priorities through a variety of acceptable administration delivery systems. See *New York State Dept. of Social Services v. Dublino,* 413 U.S. 405, 413 (1973) and cases there cited.

For example, section 406(a) of the Social Security Act was interpreted by HEW to mean that only income from a natural or adoptive father and not an unrelated adult male is actually available for the support of the minor children of the caretaker mother. California in that instance was contending that the income of a man assuming the role of spouse should be held to be available to the children. This Court gave HEW the deference due the agency charged with administration of the Act and held that agency's interpretation valid, rejecting California's proffered alternative construction. *Lewis v. Martin, supra,* 397 U.S. 552, 557-560 (1970).

In *Dandridge v. Williams,* 397 U.S. 471 (1970), HEW had approved Maryland's allocation of resources to its recipients based on a system of maximum grants, which had the effect of reducing per capita aid for large families based on the rationale of economics of scale. This Court, in upholding the State program approved by HEW in its interpretation of section 402(a)(10) of the Social Security Act, noted that the problem of allocating limited funds for the maintenance of the dependent poor was complex and could be handled in a myriad of ways and that those responsible for so doing were to be accorded considerable latitude in policy and methodology. 397 U.S. at 478-482.

In *New York State Dept. of Social Services v. Dublino, supra,* 413 U.S. 405 (1973), this Court exhaustively addressed the complex problem of the relationship of work incentive and training

provisions to welfare eligibility. Great weight was placed on HEW's responsibility for administering the Social Security Act and its interpretation of that Act as not precluding approval of AFDC State plans containing work requirements. The New York plan was approved, this Court stating once again that ". . . the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ." 413 U.S. at 420-421.

This general principle is likewise deeply embedded in California law, a fact which was acknowledged below. 63 Cal.App. 3d at 908-909; Appendix A, p. 7; *Pitts v. Perluss,* 58 Cal.2d 824, 832 (1962).

The many possible ways of dealing with the technical problem of matching outside income of recipients against maximum permissible grant entitlements is hinted at by the difficulties encountered by the court below, and illustrated by HEW's analysis of the problem, which observes:

"With respect to the first issue, this Office issued an opinion on June 7, 1973, specifically approving prior month budgeting. That opinion stated, in pertinent part, as follows:

" 'A literal reading of the language in 45 CFR section 233.20(a)(3)(ii)(c) would mean that unless the individual has his total income in hand when the assistance check is issued (or maybe even received), that income may not be deducted in determining the amount of his grant. This would mean that the only time income could be counted would be when it was received at the same time the assistance check was issued (or received). Otherwise the agency would be counting income that the individual had spent (or at least begun to spend) and that was no longer available to him. This ridiculous result was clearly not intended by the regulation.

" 'On the contrary, the regulation was intended to preclude the consideration or income that was, in fact, never

available to the individual, or that had not been available to him for a substantial period of time . . . .

" 'In fact, States have been permitted considerable administrative latitude in determining the period for which income is reflected in the assistance grant, with the result that income is not always (indeed, is not usually) deducted from the assistance check for the month the income is received . . . .' " Appendix D, p. 21.

It must be noted that HEW in its transmittal to petitioner was not mandating the use of the prior month budgeting method. It was approving the use thereof as a preferred option among others. Appendix D, p. 1. Had the court below held that the Social Security Act permitted the option of prior month budgeting but that petitioner herein was constrained from selecting that option in California, this particular reason for granting the writ would be less forceful.

However, the court was quite plain in its holding that PMB was invalidated because it was perceived to constitute a violation of the Social Security Act and HEW's regulation. 63 Cal.App.3d at 909, Appendix A, p. 8. State law is mentioned in only a peripheral fashion. The court alludes to certain state statutes concerning recoupment (Welf. & Inst. Code § 11004) and the State's standard of need and payment level (Welf. & Inst. Code §§ 11450 and 11452). It is plain beyond question, however, that State law is silent on the question of the method of computation of payment amounts. In fact, section 11004(e) specifically refers to computation of available resources " . . . according to the department standard. . . ." 63 Cal.App.3d at 911, fn. 10, Appendix A, p. 11. State welfare administration is structured like the federal system in this regard. Welfare case payment budgeting methodology is left by the Legislature to the administrative agency.

The question of when income is legally available for purposes of grant payment computation is central and critical in welfare

administration, not only in terms of State and national program budget planning, but as a matter of the program's effect on case workers and on recipients in literally millions of day-to-day transactions. As the HEW opinion above quoted from indicates, constructions of the phrase "available for current use" can range from the literal absuridity of a constant and continuous counting of cash on hand to a definition based on an accrual formula similar to that used by the Internal Revenue Service in computing the more complex tax obligations.

Respondents herein have contended for a determination that no income can be deducted from the maximum statutory entitlement unless it is actually in hand. Strained toward its breaking point, this leads inexorably to the unworkable conclusion that the presence of any money income must be verified monthly, weekly, daily, or as each bill or mealtime approaches, to determine availability to meet current needs. The court below did realize it could not accept this contrived interpretation. 63 Cal.App.3d at 913, Appendix A, p. 13.

The court, however, did not deal at all with any of the reasons that impelled the nation's two largest welfare agencies toward the favoring of prior month budgeting (PMB). Respondents at all stages of the proceedings and also the court below seemed obsessed with the notion that the government agencies involved were attempting to save grant costs at the recipient's expense. At no time whatsoever has program cost, grant level, or income amount been an issue in this litigation. Petitioner does not claim that grant costs will rise if PMB is not maintained.

The virtues of the system lie in another direction. Accuracy, certainty, and predictability are greatly enhanced because actual data is used instead of guesswork. Most of the hardship and trauma connected with constant adjustment and recoupment to repair the effects of faulty estimating is eliminated. *Administrative* costs, as opposed to grant costs, are reduced and the resultant savings of public funds make greater program enrichment attain-

able. These are things upon which petitioner as director of an agency serving needy people, places a high value.

When the court below chose to ignore the sound counsel of this and other tribunals and substitute its judgment for that of the administrative agencies on a technical matter, it was not only errors in logic and legal consequences that predictably followed, but the loss of the court's ability to blend the social objectives of the AFDC program with valuable advice on what is in fact accomplishable in the field. This petitioner and HEW have sought to do.

HEW has not here stricken down any particular type of budgeting system in favor of another. It has ruled, by regulation and by interpretation thereof, that California's PMB system is consistent with its regulation, and as a matter of policy is a preferred option. The court below chose to ignore the opinion of the agency charged with sole administrative and quasi-legislative responsibility for the subject matter, an opinion required by law to be viewed as the most authoritative. The omission is the more glaring because the existence of HEW's opinion was not even acknowledged. That opinion was not merely the most authoritative judgment, but the *only* judgment on question before the court.

HEW's interpretation of the Social Security Act on a vital question concerning welfare administration will not be applicable in California, with over 12% of the nation's caseload, unless certiorari is granted. There is also now a serious question in the other states that use prior month budgeting and also in another group of yet other states desiring to switch to prior month budgeting for the same reasons petitioner and HEW have favored it. Those states cannot proceed with any degree of certainty unless they know that HEW's interpretation of its own regulation is authoritative and will be given the weight that is its due, or at least will be applied in a uniform and ascertainable way. Uniformity can now be accomplished only by a grant of certiorari in this case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the California Court of Appeal, Second Appellate District, Division Five.

Respectfully submitted,

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(Appendices Follow)

Appendix A

[Civ. No. 47086. Second Dist., Div. Five. Nov. 17, 1976.]

MARGUARITA GARCIA et al., Plantiffs and Appellants, v. DAVID B. SWOAP, as Director, etc., Defendant and Respondent.

SUMMARY

In a class action against the Director of the State Department of Benefit Payments, recipients of the Aid to Families with Dependent Children (AFDC) program, challenged the validity of a regulation known as "Prior Month Budgeting," under which an AFDC grant for the current month is calculated on the basis of the net nonexempt income that is received two months prior to the actual payment of the grant. By application of the regulation, plaintiffs had their AFDC grants reduced to reflect income received in prior months, but which was not available when the grant was paid. Plaintiffs contended that the prior month budgeting scheme was contrary to state and federal law, and in particular was in direct conflict with the purpose of AFDC, which was to provide for the current needs of dependent children, and with a federal regulation requiring that grants to needy families be based on currently available income and resources. The trial court denied the prayer for a preliminary injunction, and judgment was entered for defendant. (Superior Court of Los Angeles County, No. 47086, David N. Eagleson, Judge.)

The Court of Appeal reversed and remanded for further proceedings holding the regulation imposing a system of prior month budgeting for the computation of AFDC assistant payments to be invalid. The Court, noting that the primary and almost exclusive purpose of the AFDC program was the protection of dependent children through the provision of assistant payments to meet their current needs, held the prior month budgeting regulation violated standards establishing that a state welfare agency may not presume that income is in fact available to the needy family

whether the income is only a hypothetical one, or whether the income was actually received, but in a past payment period, and further that a dependent child cannot be punished, through the reduction of assistance grants, for parental mismanagement of income. (Opinion by Stephens, J., with Hastings, J., concurring. Separate concurring opinion by Kaus, P. J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a, 1b) Public Aid and Welfare § 30—Aid to Families With Dependent Children—Determination of Eligibility and Aid; Judicial Review.—A state regulation for "Prior Month Budgeting," providing that an Aid for Families With Dependent Children grant for the current month is calculated on the basis of the nonexempt income that is received two months prior to the actual payment of the grant, was invalid as being in direct conflict with the purpose of the program, which is to provide for the current needs of dependent children, and with a federal regulation requiring that grants to needy families be based on currently available income and resources. In order to be in compliance with state and federal law, an aid for dependent children budgeting system should, at a minimum, consider income in the same month or within a 31-day period in which assistance payments are to be made. Furthermore, the deficiencies in the prior month budget system could not be alleviated simply by the application of an emergency payment or supplemental payment provision. However, if the regulation should be amended so as to provide payments to protect the children, the system would then comply with federal regulations.

[See Cal.Jur.2d, Social Security and Retirement Funds, § 29; Am.Jur.2d, Welfare Laws, § 19.]

(2) Administrative Law § 115—Judicial Review—Scope and Extent—Presumptions; Regularity; Validity of Rules and Regulations.—In reviewing an administrative regulation, an appellate

court cannot superimpose its own policy judgment upon that of a state administrative agency which acts in a quasi-legislative capacity.

(3) Public Aid and Welfare § 2—State and Federal Legislation—Regulations.—A state welfare administrator may not operate welfare programs which alter, impair, or impede their statutory schemes, and, to the extent that a regulation is inconsistent with controlling state and federal statutes, fundamental principles of administrative law require that it be declared invalid, and its further operation may properly be enjoined.

(4) Public Aid and Welfare § 26—Aid to Families With Dependent Children—State Compliance With Federal Law.—States which qualify for Aid to Families With Dependent Children funding and which elect to participate, must comply with the mandatory requirements established by the Social Security Act, as interpreted and implemented by regulations promulgated by the Department of Health, Education and Welfare.

(5) Public Aid and Welfare § 26—Aid to Families With Dependent Children—Purpose.—The Federal Aid to Families With Dependent Children program was designed to provide welfare for families without a "bread winner," "wage earner," or "father," a need unfulfilled by other welfare programs. As such, it has as its primary and almost exclusive purpose the protection of such dependent children through the provisions of assistance payments to meet their current needs. The state welfare agency may not frustrate that purpose to advance otherwise valid concerns such as state fiscal and deterrent objectives.

COUNSEL

Daniel M. Luevano, Rosalym M. Chapman, Philip L. Goar, Dorothy T. Lang, Warren Weinstein and Ronald S. Javor for Plaintiffs and Appellants.

Evelle J. Younger, Attorney General, Ronald V. Thunen, Jr., and Ronald Gold, Deputy Attorneys General, for Defendant and Respondent.

OPINION

Stephens, J.—In a class action against the Director of the State Department of Benefit Payments (Department) plaintiffs and appellants challenged the validity of a department regulation in a complaint for injunctive and declaratory relief. The preliminary injunction was denied, and judgment was entered for the defendant. Plaintiffs then entered the instant appeal.

Facts

Plaintiffs Marguarita Garcia and Palmida Castanon, represent themselves and a class of persons who are recipients of the Aid to Families With Dependent Children (AFDC) program. The administrative regulation challenged by them, EAS 44-315.6, provides as follows:

"Budget Period

".61 The budget period in counties without an approved alternate payment system:

".611 The budget period for AFDC-FG and AFDC-U cases shall be the second prior calendar month before the first installment of the corresponding payment period.

". . . . . .

".62 The budget period in counties with approved alternate payment systems:

".621 The budget period for AFDC-FG and AFDC-U cases shall be a 28 to 31-day period ending not more than 31 days nor less than 28 days before the first installment of the corresponding payment period. The budget period is not limited to a calendar month."

Under the instant regulation, known as "Prior Month Budgeting," an AFDC grant for the current month is calculated on the basis of the net nonexempt income that is received two months prior to the actual payment of the grant.[1] Since the budget period precedes the payment period by two months, a grant in April is based on a recipient's February income, a grant in May is based on March income, and so forth. All AFDC recipients are required to submit a monthly report of all income received during the budget period. In the intervening month between the budget period and the payment period, the County Welfare Department computes the welfare grant based upon that reported income, and issues the grant at the start of the payment period.

Appellant Garcia and her four children received an AFDC check for $355 in July 1974.[2] For the four preceding years, her only source of support was the AFDC program. In both June and July 1974, she received, in addition to the AFDC grant, $200 in child support from her ex-husband. No child support money was received in August or September. She reported the income to her caseworker on the two occasions that she received it, but claims that her caseworker never told her that the income would be used to lower her AFDC grant two months later. In August and September her AFDC grant was reduced $155 to reflect her June and July income. Appellant Garcia had no other available income in August or September other than the AFDC grant since the child support payments received in June and July had been spent on past due bills.

In July 1974, Mr. Castanon was residing with his wife and child and earned from part-time work net nonexempt income of approximately $250. Appellant Castanon declares that her hus-

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1. Because the budget period precedes the payment period by two months, Prior Month Budgeting cannot commence for a new recipient until the third month of receipt of AFDC.

2. No evidence was adduced at trial, and findings of fact were waived. The record consists solely of the complaint, answer, exhibits thereto, and three declarations.

band spent all of the income in July by contributing $180 toward his father's funeral and the remainder on his own personal needs. In August, Mr. Castanon left his family and has not returned; appellant's grant was reduced to $86 to reflect Mr. Castanon's July income.

Contentions

Appellants Garcia and Castanon contend, on behalf of themselves and the class of welfare recipients receiving aid under California's AFDC program, that the Prior Month Budgeting scheme (PMB) is contrary to state and federal law and that the regulation which implemented this scheme (EAS 44-315.6) is therefore beyond the rule-making authority of the Director of Benefit Payments. (1a) In particular, appellants claim that the PMB regulation is in direct conflict with the purpose of AFDC—to provide for the *current* needs of dependent children, and with a federal AFDC regulation (45 C.F.R. § 233.20(a)(3)(ii)(D)) requiring that grants to needy families be made based on currently available income and resources. It is further claimed that the PMB system contravenes California statutes setting minimum aid standards (Welf. & Inst. Code, § 11450) and limiting reductions of current grants to effect recoupment for prior overpayments (Welf. & Inst. Code, § 11004).

Discussion

Before reaching appellants' objections to California's current AFDC budgeting scheme we note that there may be an independent ground for reversal of the judgments against Mrs. Garcia and Mrs. Castanon. At the time of trial, the federal "income and resources" regulations then in effect allowed consideration only of "such net income as is actually available for current use *on a regular basis*" in determining the amount of AFDC assistance. (45 C.F.R. § 233.20(a)(3)(ii)(C), effective

January 29, 1969; italics added.)[3] By implication, nonregular or sporadic income was not to be considered by the welfare agency. Clearly, Mrs. Garcia's income could have been classified as "sporadic," though it is not clear that the part-time earnings of Mr. Castanon could have been so classified. Thus, Mrs. Garcia's reduction of payment could be attributed not to the operation of PMB, but rather to the possibly erroneous consideration of sporadic income in reducing a subsequent assistance grant. But because Mrs. Castanon's complaint more likely arises from the operation of the PMB system itself, we cannot avoid an evaluation of such a system in this appeal. Further, since the income and resources regulation has since been amended to delete the regular income restrictions (45 C.F.R. § 233.20(a)(3)(ii)(D), effective August 1, 1975)[4] cases such as Mrs. Garcia's will properly come within the scope of PMB, and in such cases the lower court will need our guidance as to the propriety of injunctive relief.

(2) In reviewing the Prior Month Budgeting regulation we recognize that we cannot superimpose our own policy judgment upon that of a state administrative agency which acts in a quasi-legislative capacity. (*Pitts v. Perluss*, 58 Cal.2d 824, 832 [27 Cal. Rptr. 19, 377 P.2d 83].) But the latitude which an administrator has in implementing a state and federal statutory scheme is not unlimited. (3) It is well settled that a state welfare administrator may not operate welfare programs which alter,

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3. That clause provided that in establishing the amount of AFDC assistance, "only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; . . ."

4. This clause now reads as follows: ". . . net income available for current use and currently available resources shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance; . . . ."

impair, or impede their statutory schemes (*Morris* v. *Williams,* 67 Cal.2d 733, 748 [63 Cal.Rptr. 689, 433 P.2d 697]; see also *California Welfare Rights Organization* v. *Carleson,* 4 Cal.3d 445, 458 [93 Cal.Rptr. 758, 482 P.2d 670]; *Daley* v. *State Dept. of Social Welfare,* 276 Cal.App.2d 801, 804 [81 Cal.Rptr. 318]), and it is this court's obligation to strike down regulations effectuating such welfare operations. (*Morris* v. *Williams, supra.*) Thus, to the extent that the PMB regulation is inconsistent with controlling state and federal statutes, fundamental principles of administrative law require that it be declared invalid, and its further operation may properly be enjoined. (See *Cooper* v. *Swoap,* 11 Cal.3d 856, 864-865 [115 Cal.Rptr. 1, 524 P.2d 97].)

We proceed now to an evaluation of the controlling federal law and policy governing the AFDC program. (4) Initially we note that states which qualify for AFDC funding and which elect to participate, must comply with the mandatory requirements established by the Social Security Act, as interpreted and implemented by regulations promulgated by the Department of Health, Education and Welfare. (*Ogdon* v. *Workmen's Comp. Appeals Bd.,* 11 Cal.3d 192, 199 [113 Cal.Rptr. 206, 520 P.2d 1022]; *County of Alameda* v. *Carleson,* 5 Cal.3d 730, 739 [97 Cal.Rptr. 385, 488 P.2d 953].) Title IV of the Social Security Act, 42 United States Code, section 602(a)(7), requires that a state AFDC plan "must . . . provide that the state agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid. . . ." The regulation adopted pursuant to this directive provides that "net income [actually] available for current use" shall be considered in determining need and the amount of assistance. (45 C.F.R. § 233.20(a)(3)(ii)(D).) Once a family is found to be eligible for AFDC assistance the federal statute further requires that aid to dependent children "be furnished with reasonable promptness. . . ." (42 U.S.C. § 602(a)(10).)

(5) The federal AFDC program was designed to provide welfare for families without a "breadwinner," "wage earner," or "father," a need unfulfilled by other welfare programs. (*King* v. *Smith,* 392 U.S. 309, 328 [20 L.Ed.2d 1118, 1131-1132, 88 S.Ct. 2128].) As such, it has as its primary and almost exclusive purpose the protection of such dependent children through the provision of assistance payments to meet their current needs. (42 U.S.C. § 601 (1970)); *King, supra,* at p. 325 [20 L.Ed.2d at p. 1130]; see *Rodriguez* v. *Vowell* (5 Cir. 1973) 472 F.2d 622, 627.)[5] It has been recognized, in addition, that a state welfare agency may not frustrate this purpose to advance otherwise valid concerns such as state fiscal and deterrence objectives.[6] (See *King, supra,* at p. 320 [20 L.Ed.2d at p. 1127].) Two corollaries have developed out of these principles: first, cases interpreting the "income and resources" regulations (45 C.F.R. § 233.20(a)(3)(ii)(D)) have all recognized that the state welfare agency may not *presume* that income is in fact available to the needy family whether the income is only a hypothetical one (e.g., *King, supra,* at p. 319, n. 6 [20 L.Ed.2d at pp. 1126-1127]; *Van Lare* v. *Hurley,* 421 U.S. 338 [44 L.Ed.2d 208, 95 S.Ct. 1741, 1747]), or whether the income was actually received, but in a past payment period. (*National Welfare Rights Organization* v. *Weinberger* (D.D.C. 1974) 377 F.Supp. 861, 868.) Second, cases interpreting the

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5. The AFDC program was enacted "for the purpose of encouraging the care of dependent children in their own homes . . . by enabling each state to furnish financial assistance and rehabilitation and other services, . . . to needy dependent children. (42 U.S.C. § 601 (1970).)

6. Among such objectives are the following: promotion of fiscal integrity; recovery of overpaid funds to those who might otherwise be deprived of aid; deferrence of fraudulent claims; and removal of the stigma of an uncontrollable "handout" program." (See *Note, Due Process and Statutory Limitations on AFDC Recoupment Procedures* (1974) 74 Colum.L.Rev. 1464, 1475-1476.)

federal recoupment regulation (45 C.F.R. § 233.20(a)(12)(i))[7] have established that the dependent child cannot be punished (through the reduction of assistance grants) for parental mismanagement of income. (*Hagans* v. *Wyman* (E.D.N.Y. 1975) 399 F.Supp. 421, 425; *Cooper* v. *Laupheimer* (E.D. Pa. 1970) 316 F.Supp. 264, 269.)[8]

A close analysis of the Prior Month Budgeting scheme reveals several basic shortcomings in light of the foregoing standards. In actual operation PMB is little different from its precursor, concurrent month budgeting,[9] in cases in which family income remains constant—either at a low level, or at the zero level. As long as income remains static no hardship is suffered by a family receiving a current assistance grant based on its financial status two calendar months earlier. However, in cases in which AFDC families receive sporadic income in one month (the Garcia case), or where an income source which was available one month has since ceased to be available (the Castanon case), the vagaries of this system of retrospectively applied payments become apparent.

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7. Since *National Welfare Rights Organization v. Weinberger, supra,* 377 F.Supp. 861, the federal recoupment regulation was modified to prohibit recoupment in cases in which the family has insufficient funds on hand to make up for a reduced grant. The *Weinberger* court declared the existing federal recoupment regulation invalid since it was based on the conclusive presumption that overpayment funds were currently available even though spent prior to the time of recoupment. (*Id.,* at p. 868.)

8. *Cooper, supra,* 316 F.Supp. 264, cites four remedies short of reducing assistance payments in such situations: "[1] [T]he state may provide guidance and counseling services regarding the proper use and management of AFDC funds, 42 U.S.C. § 605; [2] it may provide for protective payments, 42 U.S.C. § 606(b)(2); [3] it may appoint a guardian or legal representative to receive and manage the funds for the child, 42 U.S.C. § 1311; or [4] it may remove a child from a home upon a judicial determination that the parent is not using the funds for the benefit of the child, 42 U.S.C. §§ 605, 608(a)(1). Only if the state provides other care and assistance can it withhold AFDC aid from a needy, dependent child. 42 U.S.C. § 604(b)."

9. Under concurrent month budgeting in use in California prior to the adoption of PMB in 1972, receipt of income in one month affects assistance payments in the same month.

In the case of sporadic income, Prior Month Budgeting can be viewed as a streamlined form of recoupment—struck down in *Weinberger, supra,* in contravention to the fundamental policy of providing for the current needs of the dependent child, and in violation of the current AFDC recoupment regulations. (45 C.F.R. §233.20(a)(12)(i).) In this respect, PMB also avoids the specific recoupment limitations set forth in Welfare and Institutions Code section 11004, which parallel the federal standards.[10] Both federal and estate recoupment provisions proscribe the reduction of a subsequent assistance payment in the amount of a prior overpayment unless the recipient has sufficient income or resources available to meet the current needs of the needy child. (45 C.F.R. § 233.20(a)(12)(i)(A)(1); Welf. & Inst. Code,

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10. Subdivision (c) and (e) of the Welfare and Institutions Code provide as follows:

"(c) Any person who makes full and complete disclosure of those facts as explained to him pursuant to subdivision (a) is entitled to rely upon the award of aid as being accurate, and that the warrant he receives correctly reflects the award made, except that the county paying the aid shall be allowed a period of six months following the month of payment, or six months following the hearing provided in subdivision (e), within which to adjust any errors or changes in amount of grant resulting from changes in income or need which occur too late to be reflected in the grant of the current month. Whenever possible, adjustments or overpayments shall be prorated evenly over the adjustment period.

"(e) Current grants may be reduced because of prior overpayments only if the recipient has income or resources available in the amount by which the county proposes to reduce payment except; that where there is evidence which clearly establishes that a recipient willfully withheld information about his income or resources, such income or resources may be considered in the determination of need to reduce the amount of the grant in current or future periods. Prior to effecting any reduction of current grants to recover prior overpayments, the recipient shall be advised the proposed reduction and of his entitlement to a hearing on the propriety of the reduction. *In no event shall the grant to a needy child be reduced unless the parents or other responsible persons have sufficient available resources or income to meet the current needs of the needy child according to the department standard during the period of reduction.*" (Italics added.)

§ 11004, subd. (e).) Subdivision (e) of section 11004 is clearly worded to protect the children in these situations, while regulation EAS 44.315.8 (fn. 11) is designed to alleviate the problem and is not mandatory. We emphasize this point because it is believed that Prior Month Budgeting is a helpful and, if properly applied, reasonable method for computing welfare grants. The *regulation* should be amended so as to provide payments to protect the children. If this were accomplished, the PMB system would then comply with federal regulations. However, as PMB is presently applied, a prior "overpayment" occurs under these recoupment provisions when income is received in a particular month but is not reflected in the assistance grant for that month. (See *Oliva* v. *Swoap,* 59 Cal.App.3d 130, 137 [130 Cal.Rptr. 411].) In the guise of "retrospectively applied assistance payments," PMB provides for the same sort of correction for "overpayment" in instances of sporadic family income, but *without* the concomitant protective feature which assures that the child's current needs will not go wanting. In Mrs. Garcia's case, an isolated $200 child support payment received in June, together with a full AFDC payment that month, was the basis for an "automatic" $200 reduction in her AFDC grant for August, despite the fact that, in the interim, the "extra" funds were no longer available (having been spent on past due bills). Mrs. Garcia and her four children were thus left with $155, well below subsistence standards,[11] on which to survive the month. It is this very result which is explicitly prohibited in both state and federal AFDC law and policy, no matter what characterization the budgeting system is given.

In other than sporadic income cases, the PMB system suffers from similar shortcomings, although the analogy to recoupment

11. Welf. & Inst. Code, § 11452. The provision sets the subsistence standards for AFDC families according to the number of needy persons in the family.

may no longer apply. As an example, consider the situation in which an AFDC recipient has a regular income which, in January, suddenly ceases. The last month for which income was available is used, under PMB, to compute the AFDC payment two months later. Thus, the March grant reflects a reduction from the full AFDC payment in the amount of the January income, even though the recipient has been without any income for over a month, and even though the January income has been spent prior to the current grant or was never available to the child (as in the case of Mrs. Castanon). Here again, the disparity between current need and current, though retrospectively applied, payment is impermissible under federal AFDC law. (See 45 C.F.R. § 233.20(a)(3)(viii); *Cooper* v. *Laupheimer, supra,* 316 F.Supp. 264, 269.) Whether PMB is viewed in this instance as entertaining a presumption of current availability of past income, or as effectively punishing the needy child for parental mismanagement of funds, it is fundamentally at odds with AFDC policies and provisions.

Respondent insists that Prior Month Budgeting is a reasonable means of computing aid and is consistent with state and federal law. Specifically, he claims that the latitude allowed the states in computing AFDC grants (*Jefferson* v. *Hackney,* 406 U.S. 535, 545 [32 L.Ed.2d 285, 295, 92 S.Ct. 1724]), has not been exceeded in the adoption of the PMB regulation since PMB is far more accurate in this regard than its predecessor—concurrent month budgeting, and since it takes into consideration only such income as is actually available for current use as specified by federal regulation. While it is true that PMB does not suffer from the defect suffered by several budgeting methods which consider "hypothetical" income, we cannot agree with respondent's contention that the income considered under PMB is available for current use. It is true that the federal regulation does not prohibit a welfare agency from considering income other than that which is in the recipient's pocket at the time of the current grant in computing the amount of the payment. However, the disparity

permitted between current need and current payment cannot be countenanced when such payment is based upon income earned *two months earlier,* even where such a system may promote administrative efficiency or conserve public funds. (See *King* v. *Smith, supra,* 392 U.S. 309, 320 [20 L.Ed.2d 1118, 1127].) Current AFDC payments must be made to meet the *current* needs of the dependent child. (*Cooper* v. *Laupheimer, supra,* 316 F.Supp. 264, 269.) Whether the income used to compute aid is no longer available at the time of payment because it was spent or because it was never actually available, as in Mrs. Castanon's case, the child cannot, in effect, be punished by the reduction of AFDC assistance. (*Hagans* v. *Wyman, supra,* 399 F.Supp. 421, 425; *Cooper* v. *Laupheimer, supra,* at p. 269.) Such a system not only ignores the currency requirements for the consideration of income, but also the practical economic realities facing AFDC families, who, living at bare subsistence levels, cannot be expected to budget sporadic income for a payment period two months in the future.

An AFDC budgeting system, to be in compliance with state and federal law, should, at a minimum, consider income in the same month or within a 31 day period in which assistance payments are to be made. The inherent inaccuracies in the concurrent month budgeting system, to the extent that income must be estimated, can be quickly adjusted through the provisions of Welfare and Institutions Code section 11004. The vagaries in the existing PMB system, apparent in such cases as those of Mrs. Garcia and Mrs. Castanon, cannot be alleviated simply by the application of an emergency payment or supplement payment provision.[12] Rather, the goal of conservation of public funds can

12. We reiterate that the basic design of Prior Month Budgeting, though it works hardship in only a few instances, is incorrect. Further, the supplemental payment regulation is purely discretionary in its application. That regulation, EAS 44.315.8, provides as follows:

"If unusual and unforeseen substantial changes in a recipient's income occur, a supplemental payment may be made when necessary to protect the welfare of the child(ren). Supplemental payments shall be limited in any month to the extent that the total grant, together with currently available income, does not exceed the allowable Maximum Aid.

"When a recipient receives a supplemental payment in more than one month, the total of such payments may not exceed the recipient's total net nonexempt income during the first and second months preceding a change in budgeting method used by the county, or during the first and second months for which aid payments are made."

be enforced in conjunction with a concurrent month budgeting system through the application of civil sanctions against the parent or guardian and through programs which encourage the proper management of income.

Accordingly, we hold regulation EAS 44-315.6, imposing a system of prior month budgeting for the computation of AFDC assistance payments, to be invalid.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

Hastings, J., concurred.

KAUS, P. J.—I reluctantly concur in the result as applied to these particular plaintiffs. I feel, however, compelled to express certain reservations:

(1) As footnote 1 of the court's opinion indicates, Prior Month Budgeting (PMB) does not go into effect until the third month after payments commence. Therefore, for the first two months of eligibility the recipient receives a full grant without deduction for additional income during either month. The federal requirement is that payments begin "with reasonable promptness . . . ." Obviously, if a state cannot recoup overpayments necessarily made because of the impossibility of making immediate payments that reflect additional income not yet in the hands of the recipient, the pressures to give an elastic interpretation to the "reasonable promptness" requirement may prove irresistible. Thus, while

taking care of the problems of these plaintiffs, the net effect of our opinion may not be beneficial to welfare recipients in general.

(2) Without expressly disagreeing, I wish to disassociate myself from the court's discussions of Mrs. Garcia's problems under the former regulation referring to ". . . income . . . actually available for current use *on a regular basis* . . . ." Quite arguably this regulation intended to withdraw from consideration only true windfalls, but not child support payments which should be regularly paid, even if they are not.

(3) If current law compels the result which we reach in this case—as I agree it does—I am not nearly as sanguine as the court that "the inherent inaccuracies in the concurrent month budgeting system . . . can be quickly adjusted through the provisions of Welfare and Institutions Code section 11004." I suspect that the result of this opinion will not be a return to concurrent month budgeting but rather an attempt to scuttle, insofar as permissible, the present "pay now, recoup later" scheme.

Appendix B

In the Court of Appeal of the State of California
Second Appellate District
Division Five

MINUTES OF DIVISION FIVE
DECEMBER 15, 1976

GARCIA VS. SWOAP
2d CIVIL 47086

THE COURT: PETITION FOR REHEARING IS DENIED.

[Clerk's Stamp Certification]

Appendix C

ORDER DUE
February 15, 1977

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 5, Civ. No. 47086

In the Supreme Court of the State of California

In Bank

GARCIA ET AL.
v.
SWOAP, AS DIRECTOR, ETC.

Respondent's petition for hearing DENIED.

[Clerk's Stamped Certification]

SUPREME COURT
FILED FEB. 3, 1977
C. E. BISHEL, Clerk

TO.....
Acting Chief Justice

Appendix D

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
SOCIAL AND REHABILITATION SERVICE
Washington, D.C. 20201

Dec. 12, 1974

David B. Swoap
Director
State Department of Benefit Payments
744 'P' Street
Sacramento, California 95814

Attention: James Moose
Deputy Director, Legal Affairs

Dear Mr. Swoap:

This is in response to your departments request that we review your State's method for computing AFDC budgets and provide the Departments views regarding the legality of such procedures. Enclosed is a copy of an opinion from the office of General Counsel, HEW, setting forth the Department's views. We fully endorse this method of accounting for recipient income and consider it a proper and efficient method of administration.

Yours very truly,

JAMES S. DWIGHT, JR.

Enclosure

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY

OFFICE OF THE GENERAL COUNSEL
Human Resources Division

DATE: December 10, 1974

To: Donald M. Thayer
Director, Office of Policy Control, SRS

From: Robert P. Jaye
Deputy Assistant General Counsel

Subject: Legality of Prior Month Budgeting

Prior month budgeting is a procedure used for computing the amount of an AFDC grant on the basis of income actually available in the month prior to the computation month, which is itself one month before the payment month. For example, a computation would be made in December of a recipient's January grant. The computation would be based upon the actual income received by the recipient during November. You have first asked whether this method of "prior month budgeting" is permited by our available income regulations appearing at 45 CFR section 233.20(a)(3)(ii)(c). Second, you have stated that, for purposes of prior month budgeting, an erroneous overpayment of a welfare grant may be treated as income in a manner identical to all other inflows during the month[1] (with the sole exception of the exact amount of the welfare payment to which the recipient is actually entitled).

1. Except for those inflows which are treated as resources pursuant to the State plan.

We have concluded that neither of these practices violates our regulations.

With respect to the first issue, this Office issued an opinion on June 3, 1973, specifically approving prior month budgeting. That opinion stated, in pertinent part, as follows:

> A literal reading of the language in 45 CFR section 233.20(a)(3)(ii)(c) would mean that unless the individual has his total income in hand when the assistance check is issued (or maybe even received), that income may not be deducted in determining the amount of his grant. This would mean that the only time income could be counted would be when it was received at the same time the assistance check was issued (or received). Otherwise the agency would be counting income that the individual spent (or at least begun to spend) and that was no longer available to him. This ridiculous result was clearly not intended by the regulation.
>
> On the contrary, the regulation was intended to preclude the consideration of income that was, in fact, never available to the individual, or that had not been available to him for a substantial period of time. But when a person has, for example, regular earnings, the fact that he spends part of his paycheck before the assistance check arrives does not mean that the entire amount of the paycheck is not to be deducted in determining the amount of the assistance grant.
>
> In fact, States have been permitted considerable administrative latitude in determining the period for which income is reflected in the assistance grant, with the result that income is not always (indeed, is not usually) deducted from the assistance check for the month the income is received and available to the individual. Instead, many States find it administratively simpler and more accurate to deduct the income received in one month from the assistance check for the next month or even for the month after that. This is permitted under Federal policy as a reasonable method of administration, as long as it is applied uniformly and consistently, and it presents no conflict with our interpretation of the regulation on available income.

With respect to your second question, the regulations do not preclude treatment of any check received from the welfare agency in excess of the amount to which the recipient was entitled, as income. This is subject to the *caveat* that, unless the recovery of that overpayment is permitted by our recoupment regulations appearing at 45 CFR section 233.20(a)(12)(i), the State agency could (in the example given at the beginning of this memorandum) treat as currently available income for purposes of a December computation of a January welfare check, only overpayments received by the recipient during the month of November.

If the overpayment does not come to the agency's attention until January (or thereafter) the overpayment cannot be considered as a currently available income or resource, unless the money is, in fact, still currently available during the budget month.[2] Nevertheless, an excess payment by the welfare agency in November may be treated as income for purposes of a December computation in States that utilize prior month budgeting.

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2. Of course, recoupment under the circumstances delineated in our cited recoupment regulation would be permitted at a later date.

Prepared by RJaye:nmo, x50540
12/10/74